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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

RICHARD GEORGE,

Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD,

Defendant and Respondent.

A106078

(San Mateo County
Super. Ct. No. CIV 432646)

Richard George sued the Franchise Tax Board (FTB) to enjoin its collection activities against him, and for damages. After affording George two opportunities to state a viable cause of action against the FTB, the trial court sustained the FTB's demurrer to George's second amended complaint without leave to amend, and dismissed the action. We affirm.

BACKGROUND

On April 1, 2003, the FTB issued a Notice of Proposed Assessment (NPA) to George stating that the FTB had no record that he had filed a 2001 California personal income tax return. The NPA recited that George had not complied with a previous notice requesting that he either file his 2001 return, provide a copy of the return if already filed, or explain why he was not required to file a return for 2001. The NPA proposed to assess personal income tax against George for the 2001 tax year using an estimate of his income calculated as a multiple of his 2001 mortgage interest payments. In June 2003, the FTB issued a Notice of State Income Taxes Due for tax year 2001 to George.

In July 2003, George sued the FTB for injunctive and declaratory relief, as well as damages. The complaint alleged, inter alia, that the FTB had repeatedly placed liens on George's property and garnished his wages for the past several years, causing damage to his reputation and property. In addition to damages, George sought a declaration that there was no legal basis for the FTB's actions and an injunction barring the FTB from engaging in further collection activities against him.

The FTB successfully demurred to George's original complaint on the grounds that he: (1) could not state a cause of action for any form of equitable relief that interferes with the collection of taxes;¹ and (2) could not bring an action for damages because (a) he failed to file a claim with the proper state entity, and (b) the FTB is statutorily immune from liability under Government Code section 860.2 in any event.^{2 3} The trial court sustained the FTB's demurrer with leave to amend.

George's first amended complaint alleged six purported causes of action against the FTB: (1) lack of jurisdiction due to George's "inalienable right[]" to "immunity from nonapportioned direct taxes"; (2) lack of legal basis for the FTB's method of estimating George's 2001 income; (3) irreparable injury caused by the FTB's collection activities; (4) negligence in the FTB's handling of George's tax protest; (5) fraudulent

¹ Article XIII, section 32 of the California Constitution provides that "[n]o legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax." Section 32 provides that the taxpayer's sole remedy is to pay the tax claimed to be illegal and then bring an action for a refund with interest. (*Ibid.*)

² The FTB relied specifically on Government Code section 945.4 which provides that "no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented . . . until a written claim therefor has been presented to the public entity" That section is part of the state's Tort Claims Act, Government Code section 810 et seq.

³ Government Code section 860.2 provides as follows: "Neither a public entity nor a public employee is liable for an injury caused by: [¶] (a) Instituting any judicial or administrative proceeding or action for or incidental to the assessment or collection of a tax. [¶] (b) An act or omission in the interpretation or application of any law relating to a tax."

representations by the FTB about its administrative procedures; and (6) intentional infliction of emotional distress by filing tax liens and notifying George's employer of claimed tax liabilities. The first amended complaint also sought injunctive and declaratory relief, as well as damages. The FTB demurred again, relying on the same statutory and constitutional grounds set forth in its first demurrer. The trial court sustained the FTB's demurrer *without* leave to amend as to the first two causes of action, and *with* leave to amend as to the remaining causes of action.

George's second amended complaint restated his causes of action for irreparable injury, negligence, fraud, and intentional infliction of emotional distress, and sought injunctive relief and damages. The trial court sustained the FTB's ensuing demurrer without leave to amend, on the grounds that: (1) the court lacked jurisdiction to enjoin the collection of taxes under article XIII, section 32 of the California Constitution; (2) the FTB has immunity against damages claims under Government Code section 860.2; and (3) George failed to allege compliance with the claim presentation requirements of Government Code section 945.4. A judgment of dismissal was entered on January 27, 2004, and this appeal followed.

DISCUSSION

Failure to State Grounds

George contends that the trial court failed to inform him of the grounds upon which it sustained the FTB's demurrer to his first amended complaint in violation of Code of Civil Procedure section 472d.⁴

At the hearing on the FTB's demurrer to the first amended complaint George asked the court to state the "specifics of the grounds on which the demurrer is being sustained." The court responded, in substance, that counts one and two of the complaint did not state causes of action. The court did not address causes of action three through

⁴ Code of Civil Procedure section 472d provides in relevant part as follows: "Whenever a demurrer . . . is sustained, the court shall include in its decision or order a statement of the specific ground or grounds upon which the decision or order is based"

six. A written order sustaining the demurrer entered on the day of the hearing also did not state grounds for sustaining the demurrer.

With respect to the first and second causes of action, the trial court's statement that George failed to state a cause of action in either count was sufficient to comply with Code of Civil Procedure section 472d. (*Stevenson v. San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 275.) George was not entitled to a detailed recitation of the court's reasoning. (*Stevenson v. San Francisco Housing Authority*, at p. 275; see also, *Mautner v. Peralta* (1989) 215 Cal.App.3d 796, 801.)

Although the trial court did not specify its grounds for sustaining the FTB's demurrer to causes of action three through six, George suffered no discernible prejudice as a result. There was no mystery about the statutory and constitutional grounds for the FTB's demurrer. The FTB's legal arguments had been plainly spelled out in the FTB's demurrer to the original complaint, and were repeated without material variation in its demurrer to the first amended complaint. That all of his causes of action against the FTB were facially proscribed by specific statutory and constitutional enactments was or should have been equally plain to George. No statement by the trial court about its grounds for sustaining the FTB's demurrer would have made the application of those absolute proscriptions any clearer, or afforded George any means to avoid their effect. George is not entitled to a reversal based on the trial court's inadequate statement of grounds in ruling on the FTB's second demurrer. (See *Brown v. State of California* (1993) 21 Cal.App.4th 1500, 1506 [absent demonstration of prejudice, noncompliance with section 472d is harmless error].)

Proposed Amendments to Second Amended Complaint

George next claims that the trial court abused its discretion in denying him leave to amend his second amended complaint. He asserts that the complaint could have been amended to: (1) allege fraud on the part of specific public employees rather than the

FTB, thus allowing him to avoid the bar of Government Code section 822.2;⁵ and (2) allege compliance with the Tort Claims Act.

These proposed amendments would have been futile. George did not and could not in good faith allege that he was seeking a refund of illegally collected taxes as permitted by article XIII, section 32, or that he was suing the FTB or its employees on grounds not foreclosed by Government Code section 860.2. Allegations that public employees committed fraud against him, or that he fulfilled (or was excused from fulfilling) his duties under the Tort Claims Act would not have made George's second amended complaint legally viable. It is also doubtful that George could have pleaded facts, as opposed to his own subjective legal conclusions, showing that he presented a written claim in compliance with the Tort Claims Act, or that he was excused from doing so. The trial court did not abuse its discretion in denying him leave to amend.

Constitutionality of Article XIII, Section 32

George claims that the state's prohibition against actions to enjoin the collection of taxes is unconstitutionally overbroad, and repugnant to provisions of the United States Constitution, including the right to due process and the right to petition the government for redress of grievances.

Claims indistinguishable from George's have been considered and repeatedly rejected by the courts. (See *Aronoff v. Franchise Tax Board* (1963) 60 Cal.2d 177, 179–180 [state's power to make refund suit the exclusive means of judicial review of tax proceedings has long been unquestioned and does not violate due process]; *Flying Dutchman Park, Inc. v. City and County of San Francisco* (2001) 93 Cal.App.4th 1129, 1139 [California procedures allow taxpayer to raise all issues going to the validity of the tax imposed]; *California v. Grace Brethren Church* (1982) 457 U.S. 393, 413–417

⁵ Government Code section 822.2 states: "A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice."

[California tax litigation procedures allow state review of all constitutional claims, and do not violate First Amendment].)

George's constitutional challenge to article XIII, section 32 is meritless.

Immunity from Nonapportioned Direct Taxes

George claims he is immune from state personal income tax under article I, section 9, clause 4 of the United States Constitution which provides that “[n]o capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.” George cites no case holding that a state personal income tax runs afoul of article I, section 9. Numerous cases have upheld the imposition of federal personal income taxes against substantively identical challenges. (See, e.g., the cases cited in *In re Becraft* (9th Cir. 1989) 885 F.2d 547, 548 [finding claim that unapportioned direct income tax is unconstitutional to be frivolous, and imposing appellate sanctions for maintaining it].)

In any event, George may litigate this issue in a proper refund action. Claiming that California's personal income tax is unconstitutional does not avoid the prohibition on prepayment lawsuits under article XIII, section 32 of the California Constitution, nor does it provide any exception to the FTB's statutory immunity from damages.

The trial court properly sustained the FTB's demurrer to George's second amended complaint without leave to amend.

DISPOSITION

The judgment is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Swager, J.